90-1028

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

v

KEVIN LAMONT AMBERS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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County of Wayne

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STATEMENT OF THE QUESTION PRESENTED

DOES GRADY V CORBIN (OR ANY OTHER AUTHORITY FROM THIS COURT WITH REGARD TO DOUBLE JEOPARDY PRINCIPLES) PRECLUDE REINSTATEMENT OF ORIGINAL CHARGES THROUGH APPEAL, AND TRIAL ON THOSE CHARGES, WHERE 1) DEFENDANT HAS PLED GUILTY TO A CHARGE REDUCED BY THE MAGISTRATE AT THE PRELIMINARY EXAMINATION BEFORE THE PEOPLE COULD TIMELY AND DILIGENTLY SEEK APPEAL OF THE REDUCTION, 2) THE PLEA HAS OCCURRED WITH FULL KNOWLEDGE BY THE DEFENDANT AND HIS COUNSEL OF THE PEOPLE'S INTENT TO APPEAL, AND PARTICULARLY WHERE 3) THE PLEA IS INTENTIONALLY TAKEN BY DEFENDANT WITH ASSISTANCE OF HIS COUNSEL BEFORE A COURT UNAWARE OF THE REDUCTION OR THE PROSECUTION'S INTENTION WITH REGARD TO APPEAL OF THE REDUCTION?

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NOW COME the State of Michigan, Petitioner, through John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research Training and Appeals and prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in the above cause on April 24, 1990, leave denied by the

Michigan Supreme Court on September 28, 1990.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on April 24, 1990. The order of the Michigan Supreme Court was entered on September 28, 1990. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides, in pertinent part:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

Defendant Kevin Lamont Ambers was charged with Second Degree Murder, Languishing in the death of Maurice Harmon. A preliminary examination was held on September 20, 1988, where the charge was reduced to Assault and Battery by Judge Denise Page Hood. Under Michigan law, the prosecution could seek leave to appeal from this reduction of charges.

Defendant was apprised of the prosecution's intent to appeal the decision of the magistrate. At the conclusion of the preliminary examination, the assistant prosecutor asked the court to hold her decision

reducing charges in abeyance for one week to allow him to find additional authority or to prepare appeal papers. The court informed counsel that the People had the right to appeal only after the court made an actual decision. (Preliminary Examination Transcript (PET), 34).

The assistant prosecutor at the preliminary examination indicated that the difficulty with the court proceeding to rule was that defendant could plead guilty to Assault and Battery, and then attempt to inject double jeopardy as a defense to obtain dismissal of any appeal. (PET, 29).

On September 21, 1988, the next day, defendant appeared with his attorney before the Honorable Theresa Doss and indicated his desire to plead guilty to assault and battery. The court adjourned the matter until September 28, 1988, 9:00 a.m., at which time Judge Doss would

entertain the plea. (See the Felony Register of Actions, attached as Appendix C).

The People filed an appeal on September 27, 1988. On September 26, 1988, two days before the scheduled proceedings before Judge Doss, and without any notice to the prosecution, defendant entered a plea of guilty before the Honorable Daphne Means Curtis, receiving a sentence of probation with the first thirteen days served in the Wayne County Jail. Neither Judge Curtis nor the assistant prosecuting attorney assigned to her courtroom had any knowledge of the prior proceedings and the intent to appeal. Defendant received credit for thirteen days already served. (See Appendix C).

The Recorder's Court allowed the appeal previously filed to proceed on its merits and reversed the decision of the examining magistrate. The court ruled

defendant would be tried on the charge of Second Degree Murder, and that jeopardy did not preclude this result. Defendant filed an Application for leave to file an interlocutory appeal in the Michigan Court of Appeals. On April 27, 1989, the Court granted defendant's application.

On April 25, 1989, the Michigan Court of Appeals reversed the decision of the Honorable Dalton A. Roberson on the ground that defendant's constitutional right not to be placed in double jeopardy would be violated by a trial on the original charges after the guilty plea to the reduced charge. The court noted that "[g]enerally, in a guilty plea proceeding, jeopardy attaches when the plea is entered and sentenced (sic) is imposed on the defendant." People v Alvin Johnson, 396 Mich 424, 431, n 3; 240 NW2d 729 (1976); People v Leonard, 144 Mich App 492, 494-495; 375 NW2d 745 (1985). (slip op at 2-3). The court

held: "In the present case, on September 20, 1988, at the preliminary examination, the prosecutor indicated his intent to appeal from the district court's decision. However, the application for leave to appeal was not filed until at least September 27, despite the fact that defendant had appeared in district court on September 21 to announce his intent to plead guilty to the reduced charges. To make matters worse, the assistant prosecutor who appeared before the district court at the plea and sentence hearing neither objected to the plea nor informed the presiding district judge that an appeal was pending. We find that the prosecution's failure to pursue its appeal with the diligence warranted by the emergency nature of the proceedings and its subsequent failure to object to entry of defendant's plea was instrumental in causing defendant to be placed in jeopardy. Therefore, we

conclude that the prosecution waived its right to appeal the district court's decision to reduce the charges by its unqualified agreement to entry of defendant's guilty plea to the reduced charge." (slip op at 4). The court made no mention of the fact that the plea was taken two days before it was scheduled, and in a different courtroom than scheduled, and that the appeal was filed the day before the plea was scheduled, and within seven days of the examination reduction of charges itself.

The People applied for leave to appeal to the Michigan Supreme Court, observing that counsel was well aware that the prosecution planned to appeal the decision of the magistrate. Additionally, the plea was taken during a period of adjournment at a time when the prosecution had no knowledge of an intent to enter a plea before a court which had

no knowledge of the facts as outlined above. The People argued that under the circumstances, the failure to object to the plea could not be dispositive. The People argued that since defendant had clear notice that the People intended to seek appellate review of the reduction of charge by the examining magistrate, defendant intentionally attempted to preclude trial on the original charge by pleading guilty to the included offense before the appeal on the reduction could be filed by taking the plea two days earlier than scheduled, without notice to the prosecution, and by gaining removal of the case from the scheduled courtroom.. The prosecution stated that unless defendant was acknowledged as having "waived" any double jeopardy challenge once the appeal is had and the People are found to be meritorious, defendants could always preclude trial on the original charge no matter how egregious the error of the examining

magistrate in reducing charges. Under such circumstances, the prosecution argued, defendant's plea would merely be set aside, much like when a defendant breaches a plea agreement and the original charges are reinstated.

The Michigan Supreme Court denied the People's application for leave to appeal on September 28, 1990, stating "we are not persuaded that the question should be reviewed by this Court."

REASONS FOR GRANTING THE WRIT

Petitioner would first dispel any possible claim that the decision below rests on state grounds. The Michigan court of Appeals expressly noted that "[t]he prosecutor may appeal 'if the protection against double jeopardy under section 15 article 1 of the state constitution of 1963 and amendment V of the constitution of the United States would not bar further proceedings against

defendant.'" (slip op at 2). The state double jeopardy provision "is coterminous in operational scope with that of its Federal counterpart." People v Alvin Johnson, 396 Mich 424, 430, n 2; 240 NW2d 729 (1976). Thus, the Michigan Court of Appeals recognized the prosecutor's right to appeal if state and federal double jeopardy protections were not violated.

Petitioner submits that the issue presented is an unsettled one of significance to the nation, regarding the jeopardy consequences of a plea to a reduced charge before the State can exercise appellate rights it has under state law, particularly where the defense has so maneuvered the case as to preclude objection to the plea. In Grady v Corbin, ___ US ___; 110 S Ct 2084, 2088, fn 4; ___ L Ed 2d ___ (1990), involving a successive prosecution after a guilty plea (rather than an appeal) the Court indicated it would not decide "whether

our double jeopardy analysis would be any different if affirmative representations of fact by a defendant or his counsel were to mislead a court into accepting a guilty plea it would not otherwise accept." The court also did not consider how its double jeopardy analysis would be effected if the prosecution was diligent in its pursuit of its appeal. Citing Santobello v New York, 404 US 257, 260; 92 S Ct 495, 497; 30 L Ed 2d 427 (1971), Justice Brennan wrote for the majority:

> "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question. We have concluded that the Double Jeopardy Clause of the Fifth Amendment demands

> application of the standard announced today, but we are confident that with proper planning and attention prosecutors will be able to meet this standard and bring to justice those who make our Nation's roads unsafe."

The case at bar squarely presents the double jeopardy issue in light of diligence on the part of the prosecution, the knowledge on the part of defendant and his counsel of the prosecution's intent to appeal, and the removal of the case from the scheduled courtroom for a plea two days earlier than scheduled, and one day before the appeal was filed (which was one day <u>before</u> the plea was scheduled). With clear notice that the People intended to seek appellate review of the reduction of charge by the examining magistrate, defendant attempted to preclude trial on the original charge by pleading guilty to the included offense before time for appeal on the reduction could be had. Under these and similar circumstances jeopardy should not

bar a prosecution appeal, and trial on the original charges, the plea to the lesser offense to be set aside if the appeal from the reduction is successful on the merits (as the appeal in the present case was).

It should also be emphasized here that it cannot fairly be said that the prosecution did not diligently pursue the appeal. The appeal was filed within 7 calender days of the action of the magistrate, and, to the People's knowledge, one day before the scheduled plea (at which an assistant prosecuting attorney with knowledge of the facts could have pointed out the filing of the appeal and objected to the plea). It was the removal of the case from the scheduled courtroom and the plea two days earlier than scheduled which prevented the prosecution from objecting, and having the appeal filed prior to the plea. The plea was filed far in advance

of the time required by the Michigan court rules.

Moreover, it should also be emphasized that defendant and his counsel were apprised of the prosecution's intent to appeal the decision of the magistrate, and the prosecution's concern that what did happen, would happen. At the conclusion of the preliminary examination, the following colloquy occurred:

> THE COURT: "All right. I will refer to B.I.B. Mr. Daly, you want to speak to your client's bond?
>
> MR. DALY: Given the fact that the charge has been substantially reduced, I ask that you grant him personal bond at this time.
>
> MR. BRUNO: Judge, could I ask that with respect to Mr. Ambers that you hold your decision in abeyance?
>
> I understand the issue of bond. But can I ask that you hold that in abeyance if I --

THE COURT: Issue of bond?

MR. BRUNO: No, the issue of the bindover for one week in the event I can find additional authority for this Court or to prepare appeal papers in this matter?

THE COURT: You have the right to appeal, counsel.

I don't need to hold my decision for you. If I hold my decision, then you don't have the right to appeal. You have to wait until I make my decision." (PET, 34).

The APA indicated the dangerous implications of the court's decision:

MR. BRUNO: "That puts me in terrible dilemma because I am not sure if I can -- this Defendant can go plead guilty now to Assault and Battery, your Honor, and then I have got a double jeopardy problem if I try to even appeal this Court's order." (PET, 29).

It is clear that the People have not engaged in "governmental overreaching" that the double jeopardy clause prevents. No harassment has occurred here, rather

defendant has successfully manipulated the criminal justice system, and interposed jeopardy as a bar. Neither Grady v Corbin nor any other authority from this Court intends such a result. Failure to acknowledge the merits of the People's appeal would deny the State the opportunity to fairly enforce the laws. Ohio v Johnson, 467 US 493, 502; 81 L Ed 2d 425; 104 S Ct 2536 (1984). The judiciary must be diligent in its application of constitutional principles, and not allow them to be compromised by heavy workload on prosecutors, but it cannot be myopic--no principle served by the jeopardy clause is advanced by precluding appeal and trial on the original charges here.

CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

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JANET A. NAPP
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Dated: December 12, 1990

TAB/JAN/lap

APPENDICES

APPENDIX "A

COURT OF APPEALS OPINION

April 25, 1990

STATE OF MICHIGAN COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

vs. **No. 114908**

KEVIN LAMONT AMBERS.

Defendant-Appellee.

Before: Maher, P.J., and Gribbs and Murphy, JJ.

PER CURIAM

By leave granted, defendant brings this interlocutory appeal from a Detroit Recorder's Court order setting aside the district court's denial of plaintiff's motion to bind defendant over for trial on the charge of second-degree murder, MCL 750.317; MSA 28.549, and remanding the case to the district court for bind-over on that charge. We reverse.

On September 20, 1988, the 36th District Judge Denise Page Hood presided at a preliminary examination of defendant and a codefendant, Euland James Thomas, on the charge of second-degree murder arising out of the beating death of Maurice Harmon on September 1, 1988. Judge Hood concluded that there was insufficient evidence to bind defendant over on the second-degree murder charge and reduced the charge against defendant to assault and battery, MCL 750.81; MSA 28.276, a misdemeanor. The prosecutor stated that he intended to appeal the district court's decision. The district court denied the prosecutor's motion for a stay of proceedings.

On September 21, 1988, defendant appeared before 36th District Judge Theresa Doss and expressed his desire to plead guilty to the assault and battery charge. The plea was scheduled for September 28, 1988. However, on

September 27, 1988, defendant appeared before 36th District Judge Daphne Means Curtis, pled guilty to assault and battery, and was sentenced. The prosecutor's office filed an emergency application in the Detroit Recorder's Court for leave to appeal from the district court's refusal to bind defendant over on the second-degree murder charge. It is unclear from the record before us whether this application was filed before or after defendant's guilty plea was entered. However, the parties seem to agree that the application was filed on either September 27 or September 28, 1988. On November 21, 1988, the Recorder's Court reversed the district court's decision and remanded defendant's case to district court for a bind over on the original charge.

On appeal, defendant contends that entry of his guilty plea and sentence on

the assault and battery charge, which arose out of the same conduct for which he was originally charged with second-degree murder, bars the prosecutor's appeal from the district court's bind-over decision and the subsequent reinstatement of the original charge under the constitutional prohibition against double jeopardy. We agree, but not for the reasons advanced by defendant.

By application for leave to appeal, interlocutory orders of the 36th District Court are appealed to the Detroit Recorder's Court. MCL 770.3(1)(C), (2); MSA 28.110(1)(C), (2). Appeals by the People in a criminal case are allowed only in the specific circumstances set forth in the Code of Criminal Procedure. People v Cooke, 419 Mich 420, 427; 355 NW2d 88 (1984). The prosecutor may appeal "if the protection against double jeopardy under section 15 of article 1 of the state constitution of 1963 and

amendment V of the constitution of the United States would not bar further proceedings against the defendant." MCL 770.12; MSA 28.1109.

Generally, in a guilty plea proceeding, jeopardy attaches when the plea is entered and sentenced is imposed on the defendant. People v Alvin Johnson, 396 Mich 424, 431, n 3; 240 NW2d 729 (1976); People v Leonard, 144 Mich App 492, 494-495; 375 NW2d 745 (1985). When the plea is entered, but sentencing is delayed, jeopardy does not attach at the time the plea is accepted. Id., 495. Before jeopardy may attach, the prosecutor must accept the plea agreement. Genesee Prosecutor v Genesee Circuit Court, 391 Mich 115, 118; 215 NW2d 145 (1974).

We disagree with defendant's contention that the Recorder's Court lacked jurisdiction to hear the

prosecutor's appeal because defendant had pled guilty to the reduced charge before the application for leave to appeal was filed. We again note that it is impossible to ascertain exactly when the prosecutor's application was filed. Nevertheless, this determination has no bearing on the Recorder's Court's jurisdiction to hear the appeal period.

In People v Wolfe, 156 Mich App 225, 229; 401 NW2d 283 (1986), we stated:

> The threshold question in determining whether there was a proper prosecutorial appeal in this case is whether the statute requires that the order appealed from be entered before defendant is put in jeopardy, or whether the appeal must be taken before the defendant is put in jeopardy. We read the statute to provide that the time of the order, and not the time of the appeal, controls. The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. Melia v Employment Security Comm, 346 Mich 544, 562; 78 NW2d 273 (1956). In eenacting the above statute, the Legislature intended to limit the people's

> right to appeal, People v Cooke, 419 Mich 420, 430; 355 NW2d 88 (1984), not to make that right wholly vulnerable to defeat by trial courts. Were we to read the statute to require that the time of the appeal controls the right to taken an interlocutory appeal, trial courts would be absolutely empowered to preclude legitimately sought interlocutory appeals simply by denying a stay following the disputed order and immediately swearing the jury.

The district court order reducing the charge against defendant was entered on September 20, 1988, one week before jeopardy attached when defendant pled guilty to and was sentenced on the reduced charge of assault and battery. Therefore, we conclude that, under normal circumstances, because defendant was not in jeopardy at the time of the order from which the prosecutor appealed, the Recorder's Court had jurisdiction to hear the appeal.

However, we believe that the unusual circumstance of this case are

distinguishable from those of Wolfe supra. In that case, the prosecutor immediately commenced its appeal to this Court which was resolved in the prosecutor's favor two days later, after the jury was sworn and jeopardy attached but before a conviction was entered on the reduced charge. Id., 227.

In the present case, on September 20, 1988, at the preliminary examination, the prosecutor indicated his intent to appeal from the district court's decision. However, the application for leave to appeal was not filed until at least September 27, despite the fact that defendant had appeared in district court on September 21 to announce his intent to plead guilty to the reduced charges. To make matters worse, the assistant prosecutor who appeared before the district court at the plea and sentence hearing neither objected to the plea nor

informed the presiding district judge that an appeal was pending.

We find that the prosecution's failure to pursue its appeal with the diligence warranted by the emergency nature of the proceedings and its subsequent failure to object to entry of defendant's plea was instrumental in causing defendant to be placed in jeopardy. Therefore, we conclude that the prosecution waived its right to appeal the district court's decision to reduce the charges by its unqualified agreement to entry of defendant's guilty plea to the reduced charge.

Reversed.

/s/ Richard M. Maher
/s/ Roman S. Gribbs
/s/ William B. Murphy

APPENDIX "B"

MICHIGAN SUPREME COURT ORDER

Entered: September 28, 1990

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

vs. Sct: 89613
COA: 114908
LC: 89-001995

KEVIN LAMONT AMBERS.

Defendant-Appellee.

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

STATE OF MICHIGAN VS	FELONY REGISTER OF ACTIONS	36th DISTRICT COURT CRIMINAL DIVISION 421 Madison Avenue Detroit, MI 48226

Defendant name and address
AMBERS, KEVIN, LAMONT

465 FERNHILL

DETROIT, MI

SEP 07 1988

Sex: M Race: B DOB: 12/24/62

Defendant Arrest

Case no. 88066573-02

Offense date 9/01/88

Complaint date 9/01/88

Offense charged and statute no. 750317-B A & B 750.81

Police No. 394484 | Police Agency DPHOM | Prosecutor 88-416

BOND HISTORY

Date Set	Date Posted	Type	Amount
9-7-88		10%	100.00
9-20-88			

Defense Attorney, Address, Bar No., Telephone
(A) CRAIG DALY P27539

Arraignment Date 9-7-88 ☐ Guilty X Not Guilty ☐ No Contest X Advice

Judge Mag. Vesta E. Evenson

Adjudication Date 9-19-88 A ☐ Jury Trial ☐ Bench Trial X Exam ☐ Other

Findings ☐ Guilty as Charged ☐ Not Guilty ☐ Dismissed ☐ Nolle Prosequi

☐ Guilty, other Charge and Statute no.:

Sentence 9-26-88: Plea guilty. First 13 days Wayne County Jail. Credit given for 13 days served. $150.00 Cost

X Probation length 1 year

Judge Judge Daphne Means Curtis

DATE	CODE	ACTIONS, JUDGMENTS, CASE NOTES	Initials
9-19-88		Court Reporter Sharon Bertges / Prosecutor Paul Bruno P 25004	
9-19-88	EX	Exam heard in part, cont to 9-20-88 at 11 AM. Bond continued	
9-20-88	EX	Judge Denise Page Hood. Charge murder 2nd 750.317-B is reduced to misdemeanor A & B MCL 750.81. Bond reduced to 5000/10% new charge set for arraignment on 9-21-88 at 9 A.M. Judge Denise Page Hood	
9-21-88		Defendant present with Atty. Wants to enter a guilty plea. Adjourned to September 28, 1988, 9 AM. for Judge Doss to entertain plea. $5000/ 10% Bond Continued.	

JUDGE THELMA DOSS

REGISTER OF ACTIONS, Form No. DCY258/251 Revised 12/87